Fresh developments in the Assets of Community Value regime

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The flow of interesting points on the ACV regime continues. Recent appeal decisions before the FTT have considered a number of important aspects of the regime.

1. Multi use buildings – the facts in the Registered Proprietors of Uptin House v Newcastle City Council CR/2017/0006 reflected an aspect of the ACV regime which has not been considered in depth before. It is the possibility that community nominations may be made in relation to a whole building which has a number of separate businesses and activities carried on in separate and distinct parts of the building.

In that case the nomination was made by a group promoting the cultural and social development of the Ouseburn area of Newcastle. The tenant of the northern section of the nominated building is an active member of the group. The nomination concerned a large building which had been a Victorian school and after ceasing to be used as a school it had been divided into three sections used for a number of different purposes. For over thirty years the middle section comprising half the building had been used for a car body repair business. The southern part had been let for the sale of art and antiques but that lease had been surrendered. There had been sub-lettings of units within that section. At the time of the hearing there was a patisserie and recording studio. In the recent past there had been a screen printer, an artists studio available for occasional hire and a café.

The northern section was let for use as a training and fitness studio but it had closed by the time the judge went on a site view. The evidence given by the tenant of that northern section showed that it had not been used just as a fitness studio but fitness instructors had been trained there and in addition there had been music and art events plus activities. It was also the base for a choir and a hub for the local LGBT community. Judge Jacqueline Findlay found that a number of businesses had been housed at the building and it had hosted music concerts, art exhibitions, education health and fitness activities and provided affordable rooms to rent. Two of the businesses were still running from the building and the judge considered these not to be de minimis so that this satisfied section 88(1)(a) (actual use

furthering social wellbeing or social interests of the local community) because the use was not an ancillary use.

The combination of the businesses and activities carried on in the building caused the judge to hold that the whole building satisfied the actual use condition including the half from which the car body repair business was run. This is an interesting development which may increase the number of nominations. The involvement of the tenant in the nomination will also have significance for landlords.

However, the judge ordered the building to be removed from the ACV list because it was in a dilapidated state requiring extensive work which it was likely would cost in excess of £500,000. The judge did not consider that there was a realistic prospect that the necessary funding would be forthcoming to make the building both safe and usable. The only evidence provided had been that a person was interested in investing in the building and this was not sufficient. This finding meant that it was unnecessary to decide whether a planning permission would be implemented which had been granted around the time of the ACV listing authorising the demolition of the building and the construction of student accommodation.

2. CAMRA nominations – many of the ACV listed public houses have been nominated by CAMRA branches. It has been clearly established that a CAMRA branch can qualify as an unincorporated body. This was firmly reiterated by Judge Lane in Hamna Wakaf v Lambeth LBC CR/2015/0026.

The difficulty, however, with many nominations by CAMRA is that the nominator has not been a branch but they either have been made by CAMRA Limited or at least appear to have been. This has resulted in unnecessary rejections and difficulties. The problems caused by the involvement of the CAMRA company have been demonstrated by the recent decision of Judge Jacqueline Findlay in McNeill UB40 Limited v Hackney LBC CR/2017/0007. In this case the judge rejected the nomination because although sent in by the East London and City branch of CAMRA it was sent solely as an agent for CAMRA Limited. To hammer home the point the branch submitted that

"(a) the East London and City Branch of CAMRA is the nominating body, that the Branches of CAMRA are not separate entities and that CAMRA Ltd is a network of branches and the only identity a Branch has is that of CAMRA Ltd and that CAMRA and the East London

and City Branch of CAMRA are one and the same thing. Branches are run by volunteers who are members of CAMRA.

b. The East London and City Branch of CAMRA should not be treated as an unincorporated body as all Branches are part of CAMRA and "cannot be anything else in legal identity" (page 141). CAMRA has lodged a statement of authority to confirm that the East London and City Branch of CAMRA is authorised to act in the name of CAMRA and to bind CAMRA in the context of ACV nominations."

As the branch was acting exclusively as agent for CAMRA Limited the characteristics of the branch satisfying the statutory requirements of a local connection in reg. 4 of the Assets of Community Value Regulations 2012 were irrelevant. The focus in this context was exclusively on the company and it was held that it failed to have a local connection because its surplus was not applied at least partly for the benefit of the local authority's or a neighbouring authority's area. Although not expressly stated it was implicit from the discussion in which it was stated that in contrast to the St Gabriel Properties case the activities of the branch in the local area could not be relied on by the CAMRA company that it also failed to satisfy the requirement relating to local activities.

It is to be hoped that this decision will mean the end of attempts by CAMRA Limited to make nominations leaving this activity to be carried out only by local branches.

3. Compensation - this is an area of the ACV regime which has not been fully explored in the appeals. It seemed that it was one which was going to receive much greater attention when ACV listed public houses were taken out of the Permitted Development Rights regime in 2015. The number of claims threatened for compensation for loss of market value due to an ACV listing greatly increased. For example, in the McNeill case it was claimed that the ACV listing had reduced the value of the public house by one half which was likely to result in a compensation claim but as it was held that there was no valid community nomination this point was not material. However, the removal of all public houses from the PDR and not just those that are ACV listed has changed the position significantly and diminished the number of such claims.

Just as in Chadwick v Rossendale DC CR/2015/0006 the decision in Whitehead v Tunbridge Wells BC CR/2017/0002 highlights that making a successful compensation is not going to be simple. Compensation claims which were unsupported by invoices or other documentary evidence will be unlikely to succeed. It was acknowledged by Judge Lane that there is no statutory requirement for written evidence but he went on to say that a council

facing a compensation claim “is entitled to expect to see cogent evidence of loss” (para. 23). A further objection was that the claims were too vague. A number of the claims fell down for these reasons.

Amongst the compensation claims were some for a failed sale but as in the Chadwick case the causative link between the ACV listing and the failure of the sale was not proved. Again the evidence was vague and unconvincing.

One important point that was decided reduces the strictness of the time limit on compensation claims. Reg. 14(5)(b) requires a compensation claim to be made “before the end of thirteen weeks after the loss or expense was incurred or (as the case may be) finished being incurred.” This is a tight timetable. The Council argued that it had to be applied separately to each item of loss or expense. Judge Lane rejected this and held that as a general matter so long as an item of loss or expense has not finished being incurred then it does not matter that other items had been incurred earlier (para. 21). This means that the need for multiple compensation claims against the Council are avoided.

4. Owner’s intentions - Worthmore Properties Limited v South Oxfordshire DC CR/2017/0005 reinforces the well-established point that an owner’s intentions cannot determine the outcome of a nomination. The Crown public house in South Moreton had closed and been acquired by a property developer which had no intention to reopen it but instead intended to develop the site by constructing three dwellings. Planning permission was needed for this but had not been applied for although it was acknowledged by the developer that the ACV listing would make it harder to obtain. Judge Christopher Hughes held that it was realistic to think that notwithstanding the fixed intention of the developer the public house could be sold at a loss or the developer would allow it to be used as a pub.

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